

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 797 OF 2016
WITH
INTERIM APPLICATION NO. 980 OF 2020**

Shri Ankush Krishna Chavan

Age: 38 yrs. Occ: Nil.

R/o. Dhamani(Chavanwadi),

Malkapur, Taluka Karad,

District Satara.

(At present lodged at Sangli Jail.)

... Appellant.

v/s.

The State of Maharashtra

(At the instance of Shirala Police

Station, Dist. Sangli.)

... Respondent.

Mr. Lokesh Zade, Court Appointed advocate for appellant.

Ms. G.P. Mulekar, APP for State.

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**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

RESERVED ON : SEPTEMBER 15, 2021.

PRONOUNCED ON : SEPTEMBER 22, 2021.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellant herein is convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to Imprisonment for Life and to pay fine of Rs. 2000/- I.d. to suffer R.I. for one month by Additional Sessions Judge, Islampur in Sessions

Case No. 42 of 2015 vide Judgment and Order dated 27/10/2016.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) The appellant was married to the deceased Kamal in year 2002. The couple was residing at village Talgaon. The couple is blessed with 3 children.

(ii) On 20/4/2015 Sangita Shedage(P.W.4), sister of Kamal lodged a report at Kokrud Police Station alleging therein that her sister had disclosed to her that her husband suspected her chastity and was harassing and ill-treating her. That on 18th April, 2015 Kamal had visited her house and had reiterated her allegations against her husband. That she was residing with her sister on 18th April, 2015.

(iii) On 19th April, 2015 the accused had called upon Sangita and enquired about whereabouts of his wife. However, Sangita had feigned ignorance about whereabouts of Kamal. The accused had filed missing complaint at Karad Police Station which was registered as Missing Complaint No. 46 of 2015.

(iv) On 20/4/2015 the accused/appellant had been to the house of P.W. 4. That the husband and wife were discussing about return of Kamal to her matrimonial abode. Kamal had refused to return her matrimonial abode and thereafter, she was assaulted by the accused with pestle.

(v) On the basis of the said report, Crime No. 13 of 2015 was registered at Kokrud Police Station against the appellant for offence punishable under section 302 of the Indian Penal Code.

3 At the trial, the prosecution examined in all 12 witnesses to bring home the guilt of the accused. The material witnesses in the present case are P.W. 4 Sangita Shedage i.e. sister of the deceased Kamal, P.W. 5 Reshma Shedage who happens to be the relative of P.W. 4 and had seen the incident of assault and P.W. 6 Kondiba Shedage, husband of P.W. 4.

4 According to P.W. 4 Sangita Shedage, they are 3 sisters. Their parents had died. They have no brother. That on 18/4/2015 her sister Kamal had been to her house with a grievance against her husband that he often suspects her character and had also threatened

to kill her. She had candidly informed P.W. 4 that she would not return to her matrimonial abode until the dispute is resolved. On 19th April, 2015 the accused/appellant had called upon P.W. 4 on which he was informed that whereabouts of Kamal were not known. P.W. 4 has further stated that on 20th April, 2015 the accused/appellant had been to her house to take Kamal back to her matrimonial abode. The appellant had called Kamal inside the room. The room was open. There was hot discussion between them. The accused insisted upon her to return which she denied. In the midst of the discussion the appellant had caught hold of her neck and he had hit with pestle on her head. Kamal had fallen to the ground and had succumbed to the injury instantaneously. P.W. 4 has claimed to have seen the incident. While she was going to kitchen while preparing tea. P.W. 4 has proved the contents of FIR and the same is marked at Exh. 29. P.W. 4 has given topography of her house in the cross-examination and according to her, first room is her living room. T.V., Fridge and show case is kept in second room, whereas kitchen room is on the western side of the living room and in one room all house hold articles are kept. It is elicited in the cross-examination that Ankush was not suspecting her to be in illicit relations with any particular person. It is admitted that she

had cried loudly upon seeing her sister dead. She had not taken her sister on her arm or lap. Therefore, there was no blood stains on her clothes. Scene of occurrence was not shown by P.W. 4 but it was shown by her husband. She had not informed about the incident to anybody till lodging of FIR.

5 P.W. 5 Reshma Shedage happens to be the wife of cousin of P.W. 6 Kondiba Shedage and hence relative of P.W. 4 and P.W. 6. According to her, on 20/4/2015 between 11 to 11.30 a.m. she had heard loud sound of heated discussion from the house of her neighbours i.e. P.W. 4 and P.W. 6. She had been to their house out of curiosity. She saw the family members i.e. P.W. 4, P.W. 6, the deceased Kamal and her husband were in the house. After sometime, she had heard a loud cry and therefore, returned to the house of P.W. 4 and saw the accused holding neck of Kamal and assaulting her with pestle . It is elicited in the cross-examination that police had reached the scene of offence at 1 p.m. and the dead body was in the house upto 3 p.m. and P.W. 4 was in her house till the dead body was taken by the police. She had personally not informed the police about the incident. She has seen Kamal in the lap of P.W. 4. According to her, deceased Kamal

was lying in the third room. P.W. 4 and P.W. 5 have denied any illicit intimacy between Kamal and Kondiba, husband of P.W. 4.

6 P.W.6 Kondiba Shedage happens to be the husband of P.W. 4. According to him, Kamal had disclosed on 2-3 occasions that her husband suspected her character. His evidence corroborates that of P.W. 4. According to him, he was also present in the house on 20th April, 2015 at 11 a.m. when the accused had been to his house to fetch his wife. That accused had called his wife inside the room and in the course of hot exchange of words had assaulted her on her head with pestle. According to him, dead body of Kamal was in his house upto 2.30 p.m.

7 P.W. 3 Ravindra Shedage is the panch for the seizure of clothes of the accused. P.W. 7 Tanubai Mirukhe happens to be panch for inquest panchanama. It appears from the evidence recorded in the course of trial that the incident had taken in the residential house of P.W. 4 and therefore, P.W. 4 and P.W. 6 happen to be natural witnesses.

8 The learned Counsel for the appellant submitted that there is variance in the time when the incident has occurred as suggested by

the witnesses and the time when the FIR was recorded and the investigation was set in motion. However, the said variance, if any is immaterial in view of the evidence of P.W. 4 and P.W. 6.

9 Learned APP has submitted that the prosecution has proved its case beyond reasonable doubt and hence, no interference is warranted in the Judgment of the Trial Court.

10 PW.10 Dr. Bhagyashree had performed autopsy on dead body of deceased Kamal on 20th April, 2015 between 5 p.m. to 6 p.m.. According to her, two injuries are noted in Column No. 17 of the post mortem which are as follows :

1. CLW over occipital region upper part 4 x 3 x 2 cm. (oblique)
2. CLW over occipital region 2 cm x 1 cm x 1 cm. (oblique), 1 cm lateral to injury No. 1 right side.

Internal injuries noted in Column No. 19 of the post mortem notes are corresponding to the external injuries mentioned in Column No. 17. The post mortem notes are on Exh. 55. It is stated in the cross-examination that there were no struggling marks like nail marks on the neck of the deceased. It is further admitted that in the eventuality

there had been forceful strokes by roller stone/pestle, then there is possibility of multiple injuries. In the present case, there were no multiple injuries. It is further stated that there was semi digested food in the stomach of the deceased. There is categorical assertion that the injuries on the head of the deceased must have been sustained 6 to 6-1/2 hours prior to commencement of the post mortem and therefore, according to P.W. 10, the possibility that the incident had occurred at about 10.30 a.m. cannot be ruled out. An opinion is also expressed that in the eventuality that there is forcible fall on the pestle, then, there is possibility of causing injuries, as are mentioned in column Nos. 17 and 18.

11 Learned Counsel for the appellant has vehemently submitted that it is a specific case of the prosecution that the accused appellant had visited the house of P.W. 4 at about 11.30 a.m. and the incident had occurred in the course of discussion between the couple in the house of P.W. 4. Therefore, the prosecution has not established the exact time when the incident had occurred and the said issue goes to the root of the matter. It is also elaborated on the basis of the evidence of P.W. 10 that there was no forcible assault at the behest of

the accused. Learned Counsel submits that in fact, the very lodging of the missing complaint would show that the accused appellant was concerned about his wife missing from the house. He was in fact, misled by P.W. 4. However, he had suspected that his wife would visit her sister and therefore, had been to the house of P.W. 4 to fetch his wife and requested her to return to her matrimonial abode. That on denial to oblige, he was deprived of his self control and had assaulted her in a heat of passion. The act was not premeditated and the accused had left the pestle which was in the room where he was in heated discussion with his wife. According to learned Counsel, the act of the accused would therefore, fall under exception 4 to Section 300 of the Indian Penal Code, which reads as under :

“300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—.....

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault. ”

It is therefore, urged before us that the appellant be acquitted of the

offence punishable under section 302 of the Indian Penal Code.

12 Per contra, learned APP submits that there is no reason to disbelieve PW. 4, 5 and 6, who happens to be natural eye witnesses to the incident that the appellant has assaulted the deceased with a pestle with intention and knowledge to cause her death. It is submitted that the said defence was not taken at the stage of recording statement under section 313 of the Code of Criminal Procedure, 1973.

13 At this stage, it would be appropriate to place reliance upon the judgment of the Supreme Court in the case of **State of U.P v/s. Lakhmi**¹ wherein it is held that -

“The law is that burden of proving such an exception is on the accused. But the mere fact that accused adopted another alternative defence during his examination under [Section 313](#) of the Cr. P.C. without referring to Exception No. 1 of [Section 300](#) of IPC is not enough to deny him of the benefit of the Exception, if the Court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either

1 AIR 1998 SC1007.

through defence evidence or even through prosecution evidence by showing a preponderance of probability.”

14 In the present case, it is the specific case of the prosecution that the accused was insisting upon his wife to return to her rightful matrimonial abode with a hope that the crises would be ironed. However, the deceased denied the offer. It was as if, there was no hope for the accused that his beloved wife would return with him and being enraged and deprived of self control, had assaulted his wife with whatever available just nearby. In these circumstances, it would be necessary to read the mind of the offender and not consider the offence devoid of emotions.

15 In view of the above discussion, the case of the accused would squarely fall under section 304 Part I of the Indian Penal Code and the accused deserves to be acquitted of the offence punishable under section 302 of the Indian Penal Code.

16 Before parting with the Judgment, this Court appreciates the efforts taken by the learned Counsel appointed for the appellant. He is entitled to professional fees as per rule.

17 Hence, following order is passed :

ORDER

- (i) The appeal is partly allowed.
- (ii) The conviction and sentence imposed upon the appellant for offence punishable under section 302 of the Indian Penal Code by Additional Sessions Judge, Islampur in Sessions Case No. 42 of 2015 vide Judgment and Order dated 27/10/2016 is set aside. The appellant is acquitted of the offence punishable under section 302 of the Indian Penal Code.
- (iii) Instead, the appellant is convicted for offence punishable under section 304 Part I of the Indian Penal Code and sentenced to suffer R.I. for 8 years. Sentence of fine is maintained.
- (iv) The appellant is in jail. He is entitled to the set off for the period already undergone.
- (v) The appeal is disposed of accordingly.
- (vi) In view of disposal of the appeal, nothing survives in the Interim Application. The same is disposed of accordingly.

(SARANG V. KOTWAL, J)

(SMT. SADHANA S. JADHAV, J)